THE FIRST AMENDMENT IMPLICATIONS OF GOVERNMENT-IMPOSED À LA CARTE AND THEMED-TIER REQUIREMENTS ON CABLE OPERATORS AND PROGRAM NETWORKS

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We have been retained by the National Cable and Telecommunications Association to offer our opinion on the constitutionality of proposals to require cable television operators to offer channels on an "à la carte" or "themed-tier" basis. Currently, cable operators in the United States offer most channels as part of a package or "tier" of channels. The operators determine, in the exercise of their "editorial discretion," which channels to bundle in each tier. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

The proposed à la carte regime would require cable operators to allow consumers to purchase individually each channel carried by the operator. Under some proposals, cable operators would have the option of also offering tiers, so long as every channel was available à la carte. Under other proposals, cable operators would be permitted to offer channels only on an à la carte basis. These two variations present essentially the same constitutional issues, and we discuss them together in Part I, below.

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The proposed themed-tier regime would require cable operators to provide certain tiers, defined by the content of the programming. Cable operators might be required, for example, to provide a "family friendly" tier of channels deemed suitable for children. The government would play a role in specifying the criteria used to determine which channels would be eligible for each themed tier. We discuss the themed-tier regime in Part II, below.

Cable television engages in "speech and the communication of ideas" in many of the same ways as "the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Preferred Communications, Inc.*, 476 U.S. at 494. Like newspapers and magazines, cable television "is more than a passive receptacle or conduit for news, comment, and advertising"; decisions about which programs to make available, and how best to package them, "constitute the exercise of editorial control and judgment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); see *Preferred Communications, Inc.*, 476 U.S. at 494. As the Supreme Court has observed, "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald Publishing Co.*, 418 U.S. at 258.

That cable operators are engaged in a business does not in any way lessen their First Amendment rights. Newspapers, magazines, book publishers, and most authors are no different. As Justice Scalia recently observed, "What good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen? The right to speak would be largely ineffective if it did not

include the right to engage in financial transactions that are the incidents of its exercise." *McConnell v. FEC, — U.S. —, —* (Scalia, J., separate opinion).

In our judgment, and against this background, both the à la carte and themed-tier requirements would violate the First Amendment. Like any other measure that significantly restricts editorial discretion or significantly burdens a particular medium of communication, the proposed à la carte requirement must meet a heightened standard of justification under the First Amendment. Moreover, because the proposed themed-tier requirement would expressly impose a content-based regulation on specific categories of high-value expression, it would have to meet an even stricter standard of constitutional review. Neither the à la carte nor the themed-tier requirement can be squared with the First Amendment.

I. THE À LA CARTE REQUIREMENT

Cable television provides to its subscribers "news, information, and entertainment" and is "engaged in 'speech' under the First Amendment." Indeed, cable television today is an essential "part of the 'press.'" *Leathers v. Medlock*, 499 U.S. 439, 444 (1991). Like other parts of the press, "cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include.'" *Preferred Communications, Inc.,* 476 U.S. at 494, quoting *FCC v. Midwest Video Corp*., 440 U.S. 689, 707 (1979). Both by producing "'original programming'" and "'by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek to communicate messages on a wide variety of topics

and in a wide variety of formats.'" *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 636 (1994) [*Turner I*], quoting *Preferred Communications, Inc.*, 476 U.S. at 494. A government-mandated à la carte requirement would unconstitutionally constrain and burden these fundamental First Amendment freedoms.

It is instructive to compare the proposed à la carte requirement with the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, which the Supreme Court narrowly upheld in *Turner I* and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) [*Turner II*]. The *Turner* decisions held that the must-carry provisions were subject to "intermediate scrutiny." See, *e.g.,* 512 U.S. at 661-62; 520 U.S. at 189. Specifically, the Court ruled that those provisions would be unconstitutional unless they "advance[d] important government interests" and did not "burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189.

Under the *Turner* standard, the proposed government-mandated à la carte requirement violates the First Amendment. This is so for four reasons. First, the interests served by the proposed à la carte requirement are not the kind of "important" government interests that can justify this form of regulation of expression. Second, unlike the must-carry provisions, the proposed à la carte requirement would not substantially "advance" the interests it is said to serve. Third, unlike the must-carry provisions, the proposed á la carte requirement discriminates unconstitutionally against cable television because it cannot be justified in terms of the "special characteristics of the cable medium." *Turner I*, 512 U.S. at 661. And, fourth, the burdens that would be imposed on constitutionally

protected speech by the proposed à la carte requirement are much greater than the "modest" burdens actually imposed by the must-carry provisions upheld in *Turner* and are disproportionate to any beneficial effects that such a requirement would produce. *Turner II*, 520 U.S. at 214.

A. The Proposed À La Carte Requirement Does Not Further "Important" Government Interests.

The Court in *Turner* identified two "important government interests" that are served by the must-carry provisions: "'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems'" (*Turner II*, 520 U.S. at 190 (internal quotation marks and citations omitted)); and "'promoting the widespread dissemination of information from a multiplicity of sources.'" *Turner II*, 520 U.S. at 189, quoting *Turner I*, 512 U.S. at 662.[1] The interest in "promoting the widespread dissemination of information from a multiplicity of sources" was, in the Court's view, especially important: The Court described this as "a basic tenet of national communications policy" and a "governmental purpose of the highest order." *Turner I*, 512 U.S. at 663. It is, indeed, an interest intimately connected to the very foundations of the First Amendment. See 520 U.S. at 227 (Breyer, J., concurring).

A government-imposed à la carte regime would not, by any measure, promote interests of comparable importance. So far as we are aware, there is no suggestion that "a medium that has become a vital part of the Nation's communication system" will be

[1] Although four justices also believed that Congress had an adequate basis for concluding that the must-carry provisions were needed to avert anticompetitive conduct by cable operators, a

"endangered" unless the government imposes an à la carte requirement. Nor is such a requirement needed to avert the possibility, which the Court held to be present in *Turner*, that households that do not subscribe to cable – 40% of the population at the time of *Turner* – would lose access to free programming.

Moreover, the government's interest in "'promoting the widespread dissemination of information from a multiplicity of sources'"—the "governmental purpose of the highest order" (*Turner I*, 512 U.S. at 663)—would actually be *dis*served, in at least two specific ways, if an à la carte requirement were imposed. First, networks without a well-established niche – such as new, independent networks featuring specialty programming – would likely have greater difficulty surviving under an à la carte regime. See United States General Accounting Office, *Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate: Issues Related to Competition and Subscriber Rates in the Cable Television Industry* 36-37 (October 2003) [hereinafter *GAO Report*]. Under the current system, such networks, if included in a tier, can gain access to households that might not subscribe to them on an à la carte basis. Advertisers will be willing to pay more to take advantage of that greater access, thus giving the network an opportunity to establish itself with viewers and achieve a wider audience.

Second, when programming is distributed in tiers, consumers have access to channels they would not pay for on an à la carte basis, because they do not expect to watch them often enough, or at all. But if they subscribe to a tier, they may view such

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majority of the Court explicitly refused to rely on that justification. See 520 U.S. at 226 (Breyer, J., concurring); *id*. at 230-34 (O'Connor, J., dissenting).

channels occasionally. In this way, the current system of tiered distribution ensures a more "widespread dissemination of information from a multiplicity of sources" than would an à la carte regime. Thus, this "governmental purpose of the highest order," which played so prominent a role in justifying the must-carry regulations in *Turner*, militates *against* the constitutionality of the proposed à la carte requirement.[2]

As we understand their arguments, the proponents of an à la carte mandate assert two government interests in support of their proposal: they claim that an à la carte requirement would reduce the cost of cable television for subscribers, and they assert an interest in enabling subscribers to avoid channels carrying content to which the subscribers object. So far as the first interest is concerned, there is, as we explain below, reason to doubt that a mandated à la carte regime will have *any* beneficial effect in making cable television more affordable for consumers in general. But in any event, we are certainly unaware of any evidence remotely suggesting that the benefits to consumers would approach the benchmark established in *Turner:* preventing "a medium that has become a vital part of the Nation's communication system" from becoming "endangered."

Similarly, at least in the absence of evidence that subscribers have no other way of avoiding unwanted content, the interest in enabling subscribers to do so cannot qualify as the kind of interest that is "important" enough to justify a mandated à la carte regime. This is especially true when, as we discuss further below, the government does not impose à la carte requirements generally but instead accepts and does not specially

[2] This is not to say, of course, that the government would be justified in requiring a tiered system.

regulate the market-driven bundling of goods, services, and content throughout the economy. For these reasons, we believe that the interests advanced in support of a mandatory à la carte regime do not withstand "intermediate" scrutiny under the First Amendment.

B. The Proposed À La Carte Requirement Would Not Substantially "Advance" the Interests it Purports to Serve.

In enacting the must-carry provisions, "Congress concluded that absent a requirement that cable systems carry the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened." *Turner I*, 512 U.S. at 646 (citation omitted). The Supreme Court therefore held in *Turner* that those provisions directly advanced the government's important "interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." *Turner II*, 520 U.S. at 194. In the Court's words, the must-carry provisions were "designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming." *Turner I*, 512 U.S. at 647.

In the à la carte context, by contrast, there is no assurance that the proposed à la carte requirement would either substantially expand consumer choices *or* lower prices, rather than simply benefit some consumers at the expense of others. After reviewing this matter, the General Accounting Office concluded that in an à la carte regime "cable rates could actually increase for some consumers." *GAO Report* 34. As the GAO explained,

"advertisers will pay more to place an advertisement on a network that will be viewed, or have the potential to be viewed, by the greatest number of people." *GAO Report* 35. Advertisers on channels that are currently included in widely-distributed tiers will very likely reach fewer households under an à la carte regime, and accordingly will pay less. That revenue shortfall will have to be made up, and the most likely source is increased charges to consumers. See *GAO Report* 35-36

In addition, as the GAO noted, the equipment currently owned by most cable television subscribers does not support an à la carte regime. Thus, if such a regime were mandated in the near future, many consumers would have to spend substantial sums to lease or buy digital equipment in order to use à la carte programming. See *GAO Report* 32-33. Presumably, some consumers would prefer such a regime, notwithstanding these additional costs; but others would have a different view. The GAO concluded that it is "difficult to ascertain how many consumers would be made better off and how many would be made worse off under an à la carte approach." *GAO Report* 37. There is therefore no clear evidence that an à la carte requirement would produce the kind of far-reaching, unequivocal benefit to consumers that the Court found to be necessary in *Turner*. On the contrary, our understanding is that, according to the most sophisticated studies, almost all cable customers would be made worse off by a mandated à la carte regime, because they would pay more to receive the same or significantly less programming; they would reduce their costs only if they limited their subscription to a very few channels.

C. The Interests Assertedly Served by the Proposed À La Carte Requirement Are Not Distinctive to Cable Television Or Related To The "Special Characteristics of the Cable Medium."

In *Turner*, the Court gave great weight to the fact that the must-carry provisions addressed a problem created by the "special characteristics of the cable medium." *Turner I*, 512 U.S. at 661. Specifically, the Court held that the "must-carry provisions * * * are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Turner I*, 512 U.S. at 661; see *Turner II*, 520 U.S. at 227-28 (Breyer, J., concurring). This finding was critical to the decision because, as the Court has emphasized, "laws that single out the press, or certain elements thereof, for special treatment" are subject to "heightened First Amendment scrutiny." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) [*Turner I*] (citations omitted), quoting *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 228 (1987).. See 512 U.S. at 659 ("Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.").

Unlike the situation in *Turner*, the concerns that are said to underlie the proposed à la carte regime – the desire of some consumers for different and perhaps less expensive choices than those the market currently provides – are not in any way distinctive to cable television. To the contrary, they are present throughout the economy. That cable operators offer "tiers" of channels, instead of offering all channels on an à la carte basis,

is not evidence of a "monopolistic bottleneck" or of any other market failure; it is, rather, familiar behavior throughout a broad range of healthy, competitive markets.[3]

The argument for a government-imposed à la carte requirement appears to rest on the observation that in the existing system cable subscribers do not always have a completely free choice to subscribe to only the precise channels they want to receive and, as a consequence, some subscribers wind up paying more than they would like for the specific programming they desire. See *GAO Report* 31. Some consumers would like to subscribe to fewer channels and pay less for cable television than they do now. Others would like to fine-tune the content of what is included in any particular tier in order to suit their individual tastes and interests. For these reasons, some consumers would prefer to have the option of subscribing to individual channels instead of choosing among tiers.

There is nothing surprising or inherently illogical in this desire. But this situation – in which consumers are offered "packages" of goods and services that some would prefer to disaggregate – is a ubiquitous feature of free markets. Throughout the economy, sellers package goods and services. Consumers frequently do not have the opportunity to purchase the component parts of those goods and services à la carte. Hospitals offer packages of medical services; law firms offer packages of legal services; health insurers offer packages of coverage; manufacturers of consumer goods, such as automobiles,

[3] For this reason, the rate regulation provisions of the 1992 Cable Act, which were upheld by the U.S. Court of Appeals for the D.C. Circuit, posed an entirely different First Amendment issue than the imposition of an à la carte requirement. Those provisions survived First Amendment scrutiny because they *were* deemed justified in terms of the "special characteristic [s] of the cable market" – namely, a perceived ability of cable operators in 1992 (prior to the launch of Direct Broadcast Satellite services) to charge monopoly prices. See *Time Warner Entertainment v. FCC*,

refrigerators, and televisions, offer "standard" features that must be accepted – and paid for – if the product is purchased. In all these very common examples, and many others, consumers must accept or reject a package. They are not offered à la carte options that would enable them to pick and choose precisely what components of the package they want.

This is characteristic of speech-related markets as well. Colleges and universities routinely decline to market their courses on an à la carte basis; students must pay tuition for a minimum number of credit hours or they cannot enroll. Many periodicals are available only by subscription; single issues cannot be purchased. Sunday newspapers often include a dozen or more sections; rarely will they sell individual sections separately. Even a single issue of a magazine or a single cable channel can be seen as a "package." A consumer who wants to subscribe to only part of a magazine or to only specific programs on a cable channel ordinarily cannot do so.

In all of these situations, the nature of the package in which particular goods and services are provided – and whether and to what extent à la carte options are available – depends on the costs of supply and on the nature of consumer demand. Some consumers may want, but be unable to obtain, particular options that the market does not offer. This is an inherent feature of any well-functioning market economy. If the cost to producers of supplying a product in à la carte form is high, and the demand for the product in that form is insufficient to justify the cost, the product will not be offered à la carte. In cable, as in

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56 F.3d 151, 184 (D.C. Cir. 1995) ("[t]he government's interest in regulating cable rates is evident – protecting consumers from monopoly prices").

other markets, sellers have an incentive to supply the optimal combinations (or non-combinations) of goods and services. As in other markets, there is no reason to believe that cable operators "should" offer consumers the option to purchase individual channels and individual programs on an à la carte basis or that their tendency not to do so is the result of anything other than perfectly natural market forces.

Of course, if, in a particular market, the packages offered by sellers reflect anticompetitive conduct, the antitrust laws can address that situation. Well-established principles of antitrust law forbid certain kinds of tying arrangements and monopolies. See, *e.g.*, *Jefferson Parish Hospital Dist. No. 2. v. Hyde*, 466 U.S. 2 (1984); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985). But throughout the economy, including in many areas of vital importance to consumers, the availability of à la carte options depends on consumer decisions, suppliers' costs, and competition regulated by laws of general application, like the antitrust laws – not on specific government directives.

The proposed à la carte requirement singles out cable operators for a particularly onerous regulatory regime that is not imposed on other providers of news, information, entertainment, and education, or even on other providers of goods and services that are *not* engaged in First Amendment activity, even though the condition that gives rise to the proposal – the absence of an à la carte option – is present throughout the economy. Unlike the must-carry provisions upheld in *Turner*, the proposed à la carte requirement is not justified by the "special characteristics of the cable medium."

We are unaware of any justification for treating the cable medium differently in this respect from any other media of communication or, indeed, from any other provider of goods and services. If, for example, a legislature were to impose the equivalent of an à la carte requirement on newspapers – so that newspapers would have to offer subscribers the option of purchasing versions free of all editorials or all advertising, or of the sports, arts, or business sections – such an intrusive and discriminatory regulation would clearly violate the First Amendment. See *Miami Herald Publishing Co*, 418 U.S. at 258. Because the proposed à la carte requirement cannot be justified by the "special characteristics of the cable medium," the same conclusion governs here. See *Turner I,* 512 U.S. at 640-41; *Arkansas Writers' Project*, 481 U.S. at 228.

D. The Proposed À La Carte Requirement Would Impose Substantial and Disproportionate Burdens On First Amendment Rights.

The lower court in *Turner* found that the effects of the must-carry regulations on cable operators were "minimal" (*Turner II*, 520 U.S. at 188), and the Supreme Court concluded that "the evidence * * * indicates that the actual effects" of those regulations "are modest." *Id*. at 214. In particular, the *Turner* Court observed that "[s]ignificant evidence indicates the vast majority of cable operators have not been affected in a significant manner by must-carry" and that "[c]able operators have been able to satisfy their must-carry obligations 87 percent of the time using previously unused channel capacity[.]" *Ibid*. This finding was critical to the Court's decision upholding the must carry rules under intermediate First Amendment scrutiny.

By contrast, an à la carte regime would require fundamental changes in the editorial and business practices of all cable operators. See *GAO Report* 30. Cable operators could not simply add a few more channels, using previously unused capacity. Although some operators offer a few à la carte channels, based on market factors, our understanding is that no cable operator in the United States currently uses an entirely à la carte system. In response to the demands of the market, "most cable operators adopt very similar strategies for bundling networks into tiers of service." *GAO Report* 30. An à la carte requirement would alter, in a very significant way, the relationships of cable operators to networks and customers and interfere with their constitutionally protected editorial discretion.

As we have seen, this significant interference with First Amendment interests would produce, at best, uncertain benefits. An à la carte regime seems as likely to reduce as to increase consumer choice; it does not address any problem specific to cable television; and it may well have a negative effect on the availability of diverse programming. The alternative to a government-mandated à la carte regime is to rely on the usual safeguards of consumer choice – market competition, constrained by laws of general applicability, including the antitrust laws. In this situation, these safeguards seem likely to promote both First Amendment values and the government's legitimate interests to a greater degree than a mandated à la carte regime. But whether or not this is so, we do not believe the government can meet its burden of satisfying the standard of First Amendment scrutiny that must apply to a government-imposed à la carte regime.

We accordingly conclude that a government-mandated à la carte requirement would violate the First Amendment.

II. THE THEMED-TIER REQUIREMENT

A themed-tier requirement has many of the same constitutional defects that would be fatal to an à la carte regime. But a themed-tier requirement would go beyond even the proposed à la carte regime by introducing a content-based element into the regulation of cable television. Indeed, a themed-tier regime would be especially problematic even within the realm of content-based regulations because it would be justified on the ground that the government should require cable operators to enable consumers to shield themselves from a *particular* class of constitutionally-protected expression that some consumers might find offensive.

A themed-tier requirement would require cable operators to make available to consumers one or more tiers of programming that include only channels that satisfy certain content-based criteria. A cable operator might have to provide, for example, at least one tier containing only "family friendly" programming. As we understand the proposed regulations, the government would play a role in specifying the criteria that determine the definition of such tiers.

By establishing tiers based on content, a themed-tier requirement appears to have two related justifications. First, it would enable some subscribers to avoid channels containing content they find distasteful. Second, it would enable some subscribers to

avoid paying for, and thus supporting, programming they consider objectionable. Neither justification is sufficient to sustain the constitutionality of a themed-tier regime.

A. A Themed-Tier Requirement Cannot Be Justified As A Means Of Keeping Unwanted Programs Out Of The Home.

Certainly, nothing in the First Amendment prohibits a private media organization from deciding to offer themed-content, and nothing in the First Amendment prohibits individuals from deciding not to read or watch material they find offensive. But the First Amendment does ordinarily prohibit the government from interfering in this matter by deciding that some content must be treated differently from other content.

Under the First Amendment, a content-based regulation of high-value speech is subject to the most exacting standard of review.[4] "[A] content-based speech restriction, * * * can stand only if it satisfies strict scrutiny. * * * [It] must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 804 (2000*)*, citing *Sable Communications, Inc. v. FCC,* 492 U.S. 115, 126 (1989).

To the extent a themed-tier requirement is designed to enable consumers to avoid unwanted programming, its unconstitutionality appears to follow a fortiori from the Supreme Court's decision in *United States v. Playboy Entertainment Group, supra*. In that case, the Court invalidated a content-based regulation that required cable operators who provide channels primarily dedicated to sexually oriented programming either to

[4] As we understand the proposals, there is no suggestion that the themed-tier requirements would be addressed to low-value or no-value speech, such as speech that fits the constitutional definition of obscenity or commercial speech.

scramble those channels fully or to limit their transmission to between the hours of 10:00 p.m. and 6:00 a.m. Not only did strict scrutiny apply to that measure, but the Court went so far as to suggest that such a regulation would ordinarily be per se unconstitutional. As the Court explained, "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists." *Playboy Entertainment Group*, 529 U.S. at 813. The reason is that "[w]e are expected to protect our own sensibilities "simply by averting [our] eyes." *Ibid.*, quoting *Cohen v. California,* 403 U.S. 15, 21 (1971), and *Erznoznik v. Jacksonville,* 422 U.S. 205, 210-211 (1975).

In any event, insofar as a themed-tier requirement is intended to protect consumers from unwanted expression, a "less restrictive alternative" is readily at hand. "Cable systems have the capacity to block unwanted channels on a household-by-household basis." *Playboy Entertainment Group*, 529 U.S. at 815. If subscribers have the capacity to block any channel they choose – without any government discrimination on the basis of content – this purpose of a themed-tier regime could be served on a content-neutral basis. See *Rowan v. United States Post Office,* 397 U.S. 728 (1970). As the Court emphasized in *Playboy Entertainment Group*, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Playboy Entertainment Group*, 529 U.S. at 815. The Supreme Court recently reaffirmed these principles in *Ashcroft v. ACLU*, – U.S. – (2004) (upholding a preliminary injunction against the Child Online Protection Act). A themed-tier requirement cannot be sustained,

under the First Amendment, as a measure designed to keep unwanted programming from the home.

B. A Themed-Tier Requirement Cannot Be Justified As A Means Of Enabling Consumers To Avoid Paying For Unwanted Programs.

The second argument in support a themed-tier requirement is that under the current structure of the cable television market consumers may perceive themselves as paying for unwanted or offensive channels included in the tiers to which they choose to subscribe. A themed-tier requirement would supposedly reduce the likelihood that this will occur by mandating that cable operators offer packages that would not contain channels likely to be found objectionable. Of course, the question necessarily arises – objectionable to whom? Some may wish not to support programs with excessive violence; others, excessive sex; others, excessive religious content; others, excessive political content; others, excessive commercial hucksterism. In our constitutional system, it is not for the government to make judgments about which individuals' preferences should prevail.

A themed-tier requirement would constitute a content-based invasion by the government into the very heart of the editorial process. Some newspaper subscribers might not want to support editorials that criticize government policies, or news stories that offend their religious sensibilities, or commercial advertisements for products or services they deem harmful to the environment. But it would be unthinkable for the government to require newspapers to provide "themed" editions, purged of all

"offensive" or "non-family friendly" content. And this would be true even if a newspaper were the only local newspaper sold in the market.

Under existing law, it is doubtful that any government-imposed themed-tier regulation of speech on cable television could ever be justified, short of the most extreme situation. Certainly, such a government action cannot be justified on the ground that some consumers wish to subscribe to some channels without paying for others that they find objectionable.

We accordingly conclude that a themed-tier requirement, like an à la carte regime, would violate the First Amendment.